IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs January 28, 2009

RONALD A. BARKER v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Sullivan County
Nos. C53975 R. Jerry Beck, Judge

No. E2008-00980-CCA-R3-PC - Filed November 30, 2009

The petitioner, Ronald A. Barker, pled guilty in the Sullivan County Circuit Court to one count of felony failure to appear. Subsequently, he filed a petition for post-conviction relief, alleging that his counsel was ineffective and that his guilty plea was unknowing and involuntary. The post-conviction court denied the petition, finding that the petitioner had failed to prove his claims. On appeal, the petitioner challenges the post-conviction court's ruling. Upon review, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ., joined.

Christopher R. Stanford, Johnson City, Tennessee, for the appellant, Ronald A. Barker.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Senior Counsel; H. Greeley Welles, Jr., District Attorney General; and Joseph Eugene Perrin, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual History

The petitioner pled guilty in case number S49,508 to one count of failure to appear, a Class E felony. At the guilty plea hearing, the State recited the following factual basis for the plea:

> [The petitioner] was convicted at trial on felony drug charges in S47936, and at the time he was on bond. The Court set a probation/alternative sentencing hearing for June 21st, 2004. [The petitioner] failed to appear at that time. His whereabouts were unknown until his arrest in Florida.

> Our investigation into Florida activity of [the petitioner] revealed, and we would have witnesses to support this, that despite the fact that [the petitioner] was in jail on the date that he failed to appear, that being June the 21st, [the petitioner] had been arrested in St. Augustine, Florida, on June 15th, of 2004, approximately a week earlier, and had used the name Robert David Proffitt. [The petitioner] had remained in jail until he was released on June 28th of 2004 under the name of Robert David Proffitt.
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> [The petitioner] continued to stay in Florida despite the fact that he had failed to appear for his sentencing. His whereabouts were unknown until investigators in Florida began to investigate the use of Robert David Proffitt's alias by [the petitioner].
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> They eventually located [the petitioner] and he was arrested sometime later on the basis of that investigation. When they arrested [the petitioner] they found that in the home he was staying in were a number of items that showed [the petitioner] had tried unsuccessfully to get a social security card under the name of Robert David Proffitt.
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> They also interviewed a Susan Dunn who was a girlfriend of [the petitioner], that stated, "After the court date of conviction in Tennessee we left for Florida with the sentencing appearance pending." She went on to state that her boyfriend, [the petitioner], had told police he was Robert David Proffitt because of the warrants in Tennessee and that since his DUI arrest in May of 2004 he had used Robert David Proffitt as his own name.
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> That, in fact, when the police went to his home to arrest him on April the 13th of 2005 he continued to insist that he was Robert David Proffitt, and it wasn't until his photographs and fingerprints were run that his true identity as Ron Barker [the petitioner] was known. And at that point in time he was taken into custody, not only on their charges but also on our hold for Tennessee.

Pursuant to the plea agreement, the petitioner received a one-year sentence, which was to be served consecutively to the sentences previously imposed for the drug convictions.

Thereafter, the petitioner filed a petition for post-conviction relief in relation to his failure to appear conviction, alleging that his counsel was ineffective by failing to "fully explain and discuss his legal options, by continuing to represent him when a perceived conflict of interest existed[,] and by failing to represent him at the guilty plea hearing[.]" Additionally, the petitioner contended that his guilty plea was unknowing and involuntary.

At the post-conviction hearing, the petitioner testified that he was fifty-two years old. He said that after his drug convictions, he went to Florida to work until his sentencing hearing. The petitioner stated that he was arrested in Florida on April 13, 2005, and learned that Tennessee was seeking to extradite him. The petitioner said that he learned from a Florida prison counselor that he "had a detainer from Tennessee on me." The petitioner stated that when he investigated the detainer, he found that the Governor of Florida's warrant of rendition had expired. The petitioner said he filed a motion in the Florida courts to have the governor's warrant and the detainer dismissed because of a failure to comply with the statute of limitations. On April 4, 2006, a Florida court eventually dismissed the warrant of rendition.

The petitioner said that shortly before the hearing on the motion to dismiss the warrant, he was approached by Agents Bledsoe and Breeding from Tennessee. Agent Bledsoe asked the petitioner if he would "sign extradition," and the petitioner declined. The petitioner said that he was called back into court the following day and was asked by the judge, "Do you want to sign extradition?" The petitioner declined. The petitioner stated that he was told to sign a piece of paper, and, because he did not have his glasses, he was unable to read the paper he signed. He said that he thought it was a "release paper" and that he did not know that it was a waiver of extradition. He stated that he was taken to Tennessee two weeks after signing the paper. The petitioner denied ever signing a waiver of extradition.

The petitioner said that while he was in Florida, he wrote to two Tennessee court clerks, seeking information about his case. He wrote the clerks again after he returned to Tennessee. The petitioner said he wrote to his trial counsel five times seeking information and also attempted to reach him by telephone. He said that he never received a response to his requests.

The petitioner said that trial counsel was appointed to represent him on the failure to appear case in April 2006. The petitioner said that he first spoke with counsel in September 2006 after the petitioner filed a pro se motion asking that counsel be dismissed because of a conflict of interest, namely that counsel had previously represented Mary Darlene Rose, who the petitioner alleged was the primary witness who testified against him at his trial on the drug charges. The trial court denied the petitioner's motion.

The petitioner said that on the day of the motion to dismiss hearing, trial counsel informed him that the State had offered to allow him to plead guilty in exchange for a two-year sentence. The petitioner said that he next saw trial counsel on November 2, the day before the guilty plea hearing. During the November 2 meeting, the petitioner and trial counsel discussed possible defenses. The petitioner gave trial counsel some booking sheets indicating that the petitioner had been in jail in Florida on the day of the sentencing hearing. Trial counsel told the petitioner that he had showed the State the booking sheets but that the State did not "accept[] that for an excuse." However, the State offered to allow the petitioner to plead guilty with a recommended sentence of one year to be served at thirty percent. The petitioner said counsel advised him to accept the plea offer rather than chance a six-year sentence if he were convicted at trial. He said that, to his knowledge, trial counsel did not investigate or research the case.

The petitioner said that trial counsel was not present on the day of the guilty plea hearing. He stated that he signed the plea agreement when he met with trial counsel on the day before the guilty plea hearing. The petitioner said that trial counsel did not appear at the plea hearing and that another attorney was "up here in his place." The petitioner said he attempted to tell the attorney that something was wrong with the plea agreement. The attorney told the petitioner that he did not know anything about the petitioner's case and that if the petitioner needed more information, he should reject the plea and wait to discuss the matter with trial counsel.

The petitioner said that at the guilty plea hearing, the trial court asked him if trial counsel could have done anything for the case that he did not do, and the petitioner responded that counsel could have "read the paperwork . . . [or] [m]aybe come and see me or talk to me or something." However, the petitioner told the trial court that he was satisfied with trial counsel's representation.

The petitioner said that he pled guilty on November 3, 2006, so he could return to prison to do research regarding his drug convictions, which were more important than the failure to appear conviction. He said that he could not work on his drug case in the Sullivan County Jail because the jail did not have a law library and the prison did. The petitioner stated that the lawyer who represented him on the drug case advised him that he had a limited time to seek post-conviction relief on his drug case. The petitioner explained that if he had rejected the plea, the failure to appear case would have been postponed and he would not have had enough time to work on his drug case. Accordingly, he pled guilty in the failure to appear case so he could focus on the drug case.

The petitioner acknowledged that on May 13, 2004, he failed to appear in general sessions court for a driving under the influence (DUI) charge. Additionally, the petitioner admitted that when he was arrested on June 15, 2004, he told police that he was Robert David Proffitt. The petitioner said he never told the Florida authorities his real name or that he had a court date in Tennessee. He explained that he gave the authorities a false name hoping that he would be released quickly and be able to return to Tennessee for his sentencing.

The petitioner conceded that when he was released on June 28, 2004, he did not return to Tennessee. He said he used the alias "Robert David Proffitt" when he went to the probation office, and he tried to get a birth certificate in that name to get into a driving under the influence (DUI) program. He said he remained in Florida until April 13, 2005, when he was arrested and again used the alias "Robert David Proffitt." The petitioner said that on September 6, 2005, he was convicted in Florida on three counts of fraudulent use of the personal identification of another.

The petitioner's trial counsel testified that he was working for the public defender's office when he was appointed to represent the petitioner. Counsel acknowledged he had represented a co-defendant, Rose, in the petitioner's drug case, but he said that case was concluded at the time he was appointed to represent the petitioner on the failure to appear case. Counsel said:

> We . . . also discussed . . . the Mary Rose situation. I didn't realize he was the co-defendant in that case. I told him at that time if he felt like there was a conflict I could withdraw on it. That wouldn't be any

> problem whatsoever. And he agreed to have me continue as his attorney, which was fine.

Trial counsel said that he first contacted the petitioner by telephone on May 23, 2006, while the petitioner was in the Sullivan County Jail. The petitioner told counsel that he was in jail in Florida on the date he was scheduled to appear for his sentencing on the drug case. Counsel discovered that the petitioner was in jail under an alias. Counsel learned that the petitioner had been released from the Florida jail one week after the sentencing hearing but that he did not return to Tennessee until the next year. Counsel said the petitioner never gave a reasonable explanation of his decision to stay in Florida instead of returning to Tennessee to face sentencing for his drug convictions.

Trial counsel recalled that he met with the petitioner in the jail on September 8, 2006, to review paperwork and to discuss the merits of the case. Counsel explained all possible sentence ranges and the accompanying percentage the petitioner would have to serve in confinement before becoming eligible for release. Trial counsel told the petitioner that he was facing a minimum sentence of two years and a maximum sentence of four years. He advised the petitioner that he was a Range II offender and would be required to serve thirty-five percent of his sentence in confinement before becoming eligible for release. Additionally, counsel told the petitioner that the State had offered to allow him to plead guilty as a Range I offender with a one-year sentence and release eligibility after service of thirty percent. The sentence would be served consecutively to the sixteen-year sentence for the drug convictions.

On November 2, 2006, trial counsel reviewed the plea agreement with the petitioner at the jail. The petitioner said that he wanted to plead guilty and signed the plea agreement. Trial counsel believed that the petitioner understood his rights and that he wanted to plead guilty. Trial counsel said the petitioner was not coerced into pleading guilty.

Trial counsel said that the next day, the day of the plea, he was not in court with the petitioner due to a family obligation. Because the petitioner had already signed the plea agreement, trial counsel asked another public defender in the office to accompany the petitioner to the plea hearing. Counsel said that after he met with the petitioner on November 2, 2006, there were no"loose ends" for his associate to handle. Counsel said that if the petitioner had not signed the plea agreement, counsel would have gone to trial. The trial date was set for February 20, 2007.

At the conclusion of the post-conviction hearing, the post-conviction court stated that the petitioner had "no credibility," based in part on the petitioner's demeanor while testifying and his "evasory-type statements particularly as to material matters." The post-conviction court found that the petitioner was informed that he did not have to plead guilty and that he wanted to accept the State's offer. The court opined that the petitioner got "sweet crude on a day-before offer." The court noted that the petitioner admitted that he left the state to go to Florida and that he had been in jail in Florida under an assumed name. The post-conviction court asserted that the State had a "slam-dunk factual case" against the petitioner. Additionally, the court found that the petitioner's guilty plea was knowing and voluntary. On appeal, the petitioner challenges the post-conviction court's ruling.

II. Analysis

To be successful in his claim for post-conviction relief, the petitioner must prove all factual allegations contained in his post-conviction petition by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f) (2006). "'Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.'" State v. Holder, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999) (quoting Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n.3 (Tenn. 1992)). Issues regarding the credibility of witnesses, the weight and value to be accorded their testimony, and the factual questions raised by the evidence adduced at trial are to be resolved by the post-conviction court as the trier of fact. See Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997). Therefore, we afford the post-conviction court's findings of fact the weight of a jury verdict, with such findings being conclusive on appeal absent a showing that the evidence in the record preponderates against those findings. Id. at 578.

A. Ineffective Assistance of Counsel

A claim of ineffective assistance of counsel is a mixed question of law and fact. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). We will review the post-conviction court's findings of fact de novo with a presumption that those findings are correct. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). However, we will review the post-conviction court's conclusions of law purely de novo. Id.

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, "the petitioner bears the burden of proving both that counsel's performance was deficient and that the deficiency prejudiced the defense." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). To establish deficient performance, the petitioner must show that counsel's performance was below "the range of competence demanded of attorneys in criminal cases." Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To establish prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. Moreover,

> [b]ecause a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the [petitioner] makes an insufficient showing of one component.

Goad, 938 S.W.2d at 370 (citing Strickland, 466 U.S. at 697, 104 S. Ct. at 2069).

On appeal, the petitioner first contends that his trial counsel was ineffective because the petitioner "did not feel that he could trust the legal advice he was given by [trial counsel] because of a perceived conflict of interest." The petitioner argues that because trial counsel

> represented [the petitioner's] co-defendant in the underlying drug case and [trial counsel] further encouraged the co-defendant to testify against [the petitioner] at the jury trial, [trial counsel] could not zealously represent [the petitioner] in the felony failure to appear case that stemmed from his failure to appear for sentencing in the drug case.

Initially, we note that "an accused is entitled to zealous representation by an attorney unfettered by a conflicting interest." State v. Thompson, 768 S.W.2d 239, 245 (Tenn. 1989). A conflict of interest can arise from successive representation, namely when an attorney who once represented a co-defendant or witness currently represents the accused. See State v. Coulter, 67 S.W.3d 3, 29 (Tenn. Crim. App. 2001); see also United States v. Shepard, 675 F.2d 977, 979 (8th Cir. 1982). Actual prejudice can be found if "(1) counsel's earlier representation of the witness was substantially and particularly related to counsel's later representation of defendant, or (2) counsel actually learned particular confidential information during the prior representation of the witness that was relevant to defendant's later case." Smith v. White, 815 F.2d 1401, 1405 (11th Cir. 1987).

In the instant case, the court noted that

> [i]t would have been a conflict if [trial counsel] appeared in [the drug case] . . . . That case was over with at the time the judgments were filed. At the time, the time of running the statute of limitations for post-conviction had long expired. And that's not rocket scientist stuff.
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> The [petitioner] had been charged here with felony failure to appear for failing to come to the sentencing hearing. There's no indication that [trial counsel] would have been a witness in that case in any way. The [petitioner] just went to Florida to get work, according to him. So I can't see any conflict.

Moreover, we note that trial counsel, whose testimony the post-conviction court accredited, testified that the petitioner agreed to counsel's representation despite the alleged conflict. See John Whatley v. State, No. M2006-00250-CCA-R3-PC, 2007 WL 189463, at **8-9 (Tenn. Crim. App. at Nashville, Jan. 22, 2007). We agree with the post-conviction court that there was no conflict in trial counsel's representation of the petitioner. Further, the petitioner adduced no proof as to how he was prejudiced by the alleged conflict. Therefore, we conclude that the petitioner is not entitled to relief on this issue.

The petitioner also complains that trial counsel met with him only three times prior to the entry of his guilty plea. Specifically, the petitioner complains that trial counsel was not present with him at the guilty plea hearing. The petitioner contends that, at the guilty plea hearing, he "indicated that he no longer wished to plead guilty[,] . . . [but he] did not have the advice of his counsel and could not make an informed decision as to whether or not he would plea[d]." The petitioner maintains that he pled guilty so that he could return to the prison library and work on his drug case.

The post-conviction court found that trial counsel had fully discussed the case with the petitioner and that he informed the petitioner of the sentence he could receive if he were convicted at trial. The court believed that the petitioner understood the guilty plea and that he "thought it was a good idea." The court noted that "everything was signed and sealed" on the day prior to the guilty plea hearing, except for the trial court's acceptance of the guilty plea in accordance with Rule 11 of the Tennessee Rules of Criminal Procedure and Boykin v. Alabama, 395 U.S. 238, 244, 89 S. Ct. 1709, 1713 (1969). The post-conviction court observed that the petitioner may have "balk[ed]" about the plea but commented that "[t]hey go through that." The post-conviction court stated that the transcript of the guilty plea hearing reflects that both the trial court and substitute counsel advised the petitioner that he did not have to plead guilty. Indeed, the trial court exercised great caution and questioned the petitioner at length and advised him that if he were uncertain, he should not enter the plea. Following this advice, the petitioner indicated his desire to enter a guilty plea. The post-conviction court also noted that the State had a "slam-dunk factual case" against the petitioner for failure to appear. Based upon our review of the record, we agree with the post-conviction court that the petitioner failed to establish that he was prejudiced by trial counsel's failure to appear at the guilty plea hearing.

The petitioner next asserts that counsel was ineffective for failing to pursue his Florida incarceration as a defense to the failure to appear charge. The post-conviction court found that the State's case against the petitioner was strong, noting that

> it turns out he was, on the day he was supposed to be here, in jail in Florida. But it was under an assumed name, which he admits he didn't tell anybody about. They didn't know they had him. That just bolsters the theory of knowing failure to appear. . . .
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> But he knowing failed to appear [sic] first by going down there [to Florida]; 2) by getting arrested down there; 3) when he got arrested under an assumed name. And again that's knowing evasion of coming back to court.

The petitioner admitted that he gave police an assumed name when he was arrested in Florida. Additionally, he conceded that he was released from a Florida jail a week after his sentencing date and that he did not return to Tennessee until he was extradited the following year. The petitioner acknowledged that trial counsel informed the State of the petitioner's possible incarceration defense. He conceded that the State did not "accept[] that as an excuse, but [did offer a plea of] one year at 30% if I'd take it."

Further, the post-conviction court accredited the testimony of trial counsel who said that he researched the incarceration issue and that he was prepared to go to trial if the petitioner so desired. We, like the post-conviction court, conclude that the petitioner has failed to prove that counsel was ineffective in this regard.

B. Knowing and Voluntary Guilty Plea

As his final issue, the petitioner argues that his guilty plea was unknowing and involuntary. To pass constitutional muster, a guilty plea must be made voluntarily, understandingly, and knowingly. Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998) (citing Boykin v. Alabama, 395 U.S. 238, 244, 89 S. Ct. 1709, 1713 (1969)); see also State v. Mackey, 553 S.W.2d 337, 341 (Tenn. 1977). To determine the voluntariness and intelligence behind a guilty plea, the court must look to various circumstantial factors, i.e.,

> the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993). Furthermore, a defendant should understand the direct consequences of his guilty plea, i.e., the penalty to be imposed. Id. In determining whether a petitioner's guilty plea was knowing and voluntary, this court must look at the totality of the circumstances. See State v. Turner, 919 S.W.2d 346, 353 (Tenn. Crim. App. 1995). "This court is bound by the post-conviction court's findings unless the evidence preponderates otherwise." Bates v. State, 973 S.W.2d 615, 631 (Tenn. Crim. App. 1997).

In the instant case, the post-conviction court found that the petitioner's guilty plea was knowingly and voluntarily entered. The record reflects that the petitioner, who qualified as a Range II multiple offender, clearly failed to appear for a sentencing hearing. Trial counsel informed the petitioner of the possible sentence he was facing at trial. Trial counsel said that he reviewed the case, including possible defenses, with the petitioner. Eventually, the State offered to allow the petitioner to plead guilty and receive a one-year sentence as a standard Range I offender. At the guilty plea hearing, the trial court gave the petitioner ample opportunity to express his concerns about trial counsel and to reconsider his decision to plead guilty. However, the petitioner repeatedly stated that he understood the consequences of the plea and that he wanted to plead guilty. We conclude that the post-conviction court did not err in finding that the petitioner knowingly and voluntarily pled guilty.

III. Conclusion

Finding no error, we affirm the judgment of the post-conviction court.

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NORMA McGEE OGLE, JUDGE